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No. 07-79

In the
# Supreme Court of the United States

AMIRI BARAKA,

*Petitioner*,

v.

JAMES MC GREEVEY, ET AL.

*Respondents.*

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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## COUNTERSTATEMENT OF THE CASE

Petitioner asks this Court to review the Third Circuit's unexceptional application of the settled law which provides that state officials who engage in acts that are part of the legislative process are immune from suit. In this case, petitioner alleges that a former Governor of New Jersey and his aide orchestrated the passage of a statute, signed into law by the Governor, which repealed a statute that had provided for the position of poet laureate of New Jersey. The Third Circuit followed this Court's precedent and properly determined that legislative immunity barred petitioner's claims concerning the enactment of this statute. Intervention by this Court is not warranted, where the standards governing legislative immunity are clear and the circuit courts have applied them consistently.

In 1999, the New Jersey Legislature enacted a statute which established the "New Jersey William Carlos Williams Citation of Merit" to be presented to a poet "who shall be considered the poet laureate of the State of New Jersey for a period of two years." P.L. 1999, c. 228, codified at *N.J. Stat. Ann.* §52:16A-26.9. The legislation provided that the poet laureate would be selected by a panel convened by the New Jersey Council for the Humanities, in consultation with the New Jersey State Council on the Arts, and would receive an honorarium of $10,000. *Ibid.*

Pursuant to this statute, petitioner Amiri Baraka was named the New Jersey poet laureate in July 2002 (Pa3).[1] On September 19, 2002, Baraka publicly read one of his poems at the Geraldine R. Dodge Poetry Festival in Stanhope, New

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[1] "Pa" refers to the appendix to the petition for *certiorari*.

Jersey. This poem,[2] entitled "Somebody Blew Up America," commented on the World Trade Center attack of September 11, 2001 with the following lines:

> Who found Bin Laden, maybe they Satan/Who pay the CIA/Who knew the bomb was gonna blow/Who know why the terrorists/Learned to fly in Florida, San Diego/Who know why Five Israelis was filming the explosion/And cracking they sides at the notion/ ... Who knew the World Trade Center was gonna get bombed/Who told 4000 Israeli workers at the Twin Towers/To stay home that day/Why did Sharon stay away?

The poem, with its suggestion of Israeli complicity in the September 11 terrorist attack, provoked an outcry and calls for Baraka's resignation as poet laureate. Petition for *certiorari* at 3-4 and Pa4. Baraka refused to resign or apologize for the poem. Almost a year later, the New Jersey Legislature passed a statute which repealed *N.J. Stat. Ann.* §52:16A-26.9, the legislation which had provided for the New Jersey William Carlos Williams Citation of Merit and the selection of a poet laureate. Governor McGreevey signed this bill into law on July 2, 2003. P.L. 2003, c. 123.

On April 26, 2004 Baraka filed a complaint in the United States District Court, District of New Jersey. The complaint named as defendants Governor McGreevey; Sharon Harrington, the Chairperson of the New Jersey State Council on the Arts; the State; the Arts Council; and unknown individuals and agencies.

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[2] The complete text of the poem was attached to the complaint filed by Baraka in this matter. It is also available at the web site indicated in the Third Circuit's opinion below at Pa4, n.2.

The complaint, brought under 42 U.S.C. §§1983 and 1988 and 28 U.S.C. §2201 *et seq.*, alleged that as a result of plaintiff's refusal to resign as poet laureate, Governor McGreevey directed defendant Harrington, as Chairperson of the Arts Council, not to pay to plaintiff the statutorily-authorized $10,000 honorarium. It further alleged that the New Jersey Legislature enacted legislation "orchestrated and directed" by the Governor's "office, agents and staff," and that Governor McGreevey signed this statute into law, abolishing the position of poet laureate. The complaint claimed that these actions were directed at plaintiff because of his poem, in violation of the First and Fourteenth Amendments (Pa5). The complaint sought payment of the honorarium, reinstatement to the poet laureate position, damages and attorneys fees (Pa6).

Defendants moved to dismiss the complaint under Fed. R. Civ. P. 12(b)(6), on the basis that accepting the allegations for purposes of the motion as true, the complaint failed to state a claim upon which relief can be granted. In an opinion dated March 21, 2005, the Honorable Garrett E. Brown, Jr., U.S.D.J., granted defendants' motion to dismiss the complaint (Pa46 to Pa59). Judge Brown held that the Eleventh Amendment barred plaintiff's claims against the State, the Arts Council and unknown government employees and entities. He further determined that claims against the unknown employees and entities must be dismissed because plaintiff failed to attribute any conduct to them. Judge Brown also dismissed all claims related to non-receipt of the $10,000 honorarium, based on the conclusion that plaintiff had no contractual or other legally-enforceable entitlement to such payment where the Legislature did not appropriate funds for the honorarium. Finally, he dismissed the claims concerning the abolition of the poet laureate position on the basis that Governor McGreevey and Harrington had absolute legislative immunity in this regard.

In an opinion dated Mach 21, 2007, the United States Court of Appeals for the Third Circuit affirmed the dismissal of the complaint. (Pa1 to Pa43), reported at 481 F.3d 187 (3d Cir. 2007). With regard to the legislative immunity accorded to

Governor McGreevey and Harrington, which is the sole aspect of the decision below challenged by the petition for *certiorari*, the court held that because the complaint alleged that the actions of McGreevey and Harrington were legislative, they were entitled to absolute immunity (Pa9). The Third Circuit followed the rule established by the Supreme Court that absolute legislative immunity shields from suit not only legislators, but also public officials outside of the legislative branch when they perform legislative functions. (Pa8, citing *Bogan v. Scott-Harris*, 523 U.S. 44, 54 (1998); *Supreme Court of Virginia v. Consumers Union of the U.S., Inc.*, 446 U.S. 719, 734 (1980); *Tenney v. Brandhove*, 341 U.S. 367 (1951)). The Third Circuit stated that the issue here is whether the actions of the defendants were "in the sphere of legitimate legislative activity." (Pa8, quoting *Bogan* and *Tenney*). It noted that in *Bogan*, the Supreme Court held that legislative immunity applied to a mayor and a city council member who

> played central roles in advocating, promoting, and passing an ordinance that eliminated a government office of which plaintiff was the sole employee. *Id.* In concluding absolute legislative immunity applied, the Court held the city council member's acts of voting for the ordinance were "in form, quintessentially legislative," and the mayor's acts of introducing a budget and signing the ordinance into law "also were formally legislative." *Id.* at 55. [Pa9-Pa10].

The Third Circuit determined that Baraka had conceded that Governor McGreevey and Harrington had similarly "actively participated in the legislative process." (Pa9). The court found that Baraka's claim, as stated in his complaint and in his briefs, is that these two public officials had "advocat[ed]," "promote[ed]," and "orchestrated" the legislation in question (Pa9, Pa10). The Third Circuit therefore noted its agreement with the District Court's conclusion that the gravamen of the complaint is that the above two officials

"'orchestrated and directed' the New Jersey legislature to abolish the position of Poet Laureate.'" (Pa14).

The court further determined that Baraka had "conceded" that Governor McGreevey's actions were "central, or integral," to the legislative process (Pa10). The court observed that the New Jersey Constitution authorizes the Governor to recommend legislation (Pa10). The court concluded further that the cause of action here also necessarily encompassed the Governor's legislative action of signing the statute into law (Pa10-Pa11). Harrington, as the Governor's appointee, was also entitled to immunity for her role in assisting the Governor in the legislative process (Pa9-Pa10).[3]

The Third Circuit also rejected petitioner's argument that the actions of the Governor and Harrington were administrative rather than legislative. Relying on *Bogan*, the Court determined that the applicable test for evaluating this claim is whether the officials' activities were both substantively and procedurally legislative in nature (Pa13 to Pa14). The Court held that pursuant to this standard, the defendants were properly afforded legislative immunity. The Court reiterated that the actions of which Baraka complained — the orchestration and direction of the New Jersey Legislature's enactment of a statute — were procedurally legislative (Pa14). The Court concluded that these actions also were substantively legislative because they involved elimination, by statute, of a position that had been legislatively created, thus constituting "the type of 'policy-making' that traditional legislation entails...." (Pa15).

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[3] Judge Nygaard dissented on the basis that the act of orchestrating and directing the enactment of legislation by a governor and his aide does not fall within the protection of legislative immunity. The majority opinion commented that this view is contrary to the Supreme Court's decisions in *Bogan* and *Tenney* (Pa18 to Pa19).

In this regard, the Court further stated:

> Baraka asks us to do what the Supreme Court has labeled erroneous – "rel[y] on [defendants'] subjective intent in resolving the logically prior question of whether their acts were legislative." *Bogan*, 523 U.S. at 54. Governor McGreevey's and Harrington's subjective intent plays no role in our analysis of whether or not their acts were legislative. The relevant question is whether, "stripped of all considerations of intent and motive, [defendants'] actions were legislative." *Id.* at 55. Both in form and in substance, the actions of both defendants were legislative. [Pa17].

The Third Circuit also considered Baraka's contention that legislative immunity did not bar his claim for reinstatement as poet laureate against the Governor and Harrington in their official capacities. The Court indicated that it has interpreted the Supreme Court's opinion in *Supreme Court of Virginia*, *supra*, as holding that in appropriate cases, legislative immunity applies to claims for declaratory and injunctive relief against officials in their official capacities (Pa20). The Court relied on its prior opinion in *Larsen v. Senate of Commonwealth of Pa.*, 152 F.3d 240 (3d Cir. 1998), in which it considered a complaint brought by a Pennsylvania Supreme Court justice against state senators who had impeached him. In *Larsen*, the Third Circuit held that the senators were entitled to absolute legislative immunity. This immunity extended to the plaintiff's request for reinstatement to his judicial position. The Third Circuit explained here that in *Larsen*, it had determined that legislative immunity barred the claim for reinstatement because such a remedy, which would require the legislators to rescind their impeachment votes, interfered with the legislative process. The court concluded here:

> Like the relief sought in *Larsen*, the relief sought by Baraka would infringe on the role of the New Jersey Legislature. Baraka seeks to require New Jersey

> legislators to rescind their votes repealing the statute and to enact legislation recreating the position. We agree with the District Court's conclusion that this "would be inconsistent with the general policies underlying legislative immunity," and "would seriously interfere with the role assigned exclusively to the Legislature." Debating, voting on, and passing statutes are "role[s] assigned exclusively" to the Legislature, and this case is an "appropriate case" for application of legislative immunity to a claim for prospective relief. [Pa21 (citations omitted)].

On July 19, 2007, Baraka filed a petition for *certiorari* with regard to the Third Circuit's grant of legislative immunity. By letter dated September 10, 2007, the Supreme Court directed that a response be filed on behalf of the respondents.

## ARGUMENT

### I. CERTIORARI IS NOT WARRANTED BECAUSE THE THIRD CIRCUIT CORRECTLY HELD, CONSISTENT WITH THE DECISIONS OF THIS COURT, THAT THE GOVERNOR AND HIS AIDE ENGAGED IN ACTS THAT WERE PART OF THE LEGISLATIVE PROCESS WHERE, ACCORDING TO THE CLAIM OF THE PETITIONER, THEY ORCHESTRATED AND DIRECTED THE PASSAGE OF LEGISLATION AND THE GOVERNOR SIGNED THAT LEGISLATION INTO LAW.

The Supreme Court has held that officials outside the legislative branch have legislative immunity where they engage in actions integral to the legislative process. See *Bogan, supra.* The actions of Governor McGreevey and Arts Council Chairperson Harrington which are challenged here – orchestrating and directing the passage of legislation and signing that legislation into law – are unquestionably acts integral to the legislative process, pursuant to this Court's

precedents as well as the consistent rulings of circuit courts which have considered similar activities by officials.

In addition to being procedurally legislative, the activities of the Governor and his aide were substantively legislative. In *Bogan*, this Court unambiguously held that legislation which abolishes a position meets the substantively legislative criterion, and that the intent underlying enactment the legislation may not be considered. The Third Circuit properly followed this rule in concluding that legislative immunity applied here.

**A. The Third Circuit Properly Held That Governor McGreevey And Harrington Performed Legislative Functions In Directing The Legislature's Passage Of Legislation And In Signing It Into Law.**

It has been settled by the Supreme Court that legislative immunity applies both to legislators and other public officials when they perform legislative functions. *Bogan*, *supra*, 523 U.S. at 55; *Supreme Court of Virginia*, *supra*, 446 U.S. at 734. According to the Supreme Court, whether such immunity applies requires a determination as to whether the officials' actions were "'in the sphere of legitimate legislative activity.'" *Bogan*, *supra*, 523 U.S. at 54, quoting *Tenney*, *supra*, 341 U.S. at 376. The standard which governs this inquiry, according to this Court, is that legislative immunity applies to activities that are "part of the legislative process," as distinguished from those that are "casually or incidentally related to legislative affairs." *United States v. Brewster*, 408 U.S. 501, 516 (1972). *See also Gravel v. United States*, 408 U.S. 606, 625 (1972).

The overarching principle is that an activity is part of the legislative process for immunity purposes where it is, as the Supreme Court has stated with regard to Congress, "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." *Id.* at 625. The

immunity enjoyed by members of Congress for their legislative actions is equivalent to the legislative immunity accorded to state and local officials. *See Bogan, supra*, and *Tenney, supra*. Based on this standard, the Court has identified examples of activities that are part of the legislative process for immunity purposes, such as voting for legislation or a resolution, preparing investigative reports, addressing a legislative committee or body, introducing a budget and signing or vetoing legislation. *See Bogan, supra*; *Gravel, supra*; *Powell v. McCormack*, 395 U.S. 486 (1969); *Doe v. McMillan*, 412 U.S. 306 (1973); *United States v. Johnson*, 383 U.S. 169, 184 (1966). *See also Almonte v. City of Long Beach*, 478 F.3d 100, 107 (2d Cir. 2007) (legislators' meetings with interested parties, including executive officers, concerning pending legislation); *Aitchison v. Raffiani*, 708 F.2d 90 (3d Cir. 1983) (borough attorney's advising legislative body with regard to drafting ordinance).

In contrast, activities that are not considered being part of the legislative process include services performed for constituents, such as assisting in procuring government contracts; sending newsletters to constituents; issuing news releases; and delivering speeches outside of Congress. *United States v. Brewster, supra*, 408 U.S. at 512. The Seventh Circuit cases upon which petitioner principally relies (petition at 13), further illustrate the distinction between legislative actions and those that are "incidentally related to legislative affairs." *Hansen v. Bennett*, 948 F.2d 397 (7th Cir. 1991), *cert. den.* 504 U.S. 910 (1992), involved the latter type of activity. A mayor's action in ordering the removal of the plaintiff from a city council meeting was deemed non-legislative. *Id.* at 400. *See also id.* at 402-03 (emphasizing that the portion of the meeting from which plaintiff was ejected did not involve discussion of any legislative issues). In contrast, in *De la Biblia Abierta v. Banks*, 129 F.3d 899 (7th Cir. 1997), the court held that an alderman's request to postpone a legislative hearing was entitled to legislative immunity; such action was "inextricably intertwined with the legislative process of introducing and

voting on the zoning ordinances and cannot be separated from those legislative functions." *Id.* at 906.

The Third Circuit appropriately followed Supreme Court precedents in concluding that Governor McGreevey and Harrington engaged in acts that were integral parts of the legislative process, rather than in conduct only incidentally related to legislative affairs. Indeed, the complaint here specifically contends that these defendants performed acts integral to the legislative process by orchestrating and directing the Legislature's passage of the statute in question. Moreover, the complaint states that Governor McGreevey signed the legislation into law.

The act of a Governor in signing a statute into law is unquestionably an integral step in the legislative process for purposes of legislative immunity. *Bogan, supra*; *Edwards v. U.S.*, 386 U.S. 482, 490 (1932); *Smiley v. Holm*, 285 U.S. 355, 372-73 (1932). Indeed, petitioner does not dispute this. Petition at 13. Since it is also undisputed that Governor McGreevey signed the statute here into law, the Third Circuit properly granted legislative immunity.

Petitioner's characterization of the Governor's and Harrington's other actions as merely involving the communication of their views to legislators (Petition at 15), is flatly contradicted by the complaint itself, which says that these officials orchestrated and directed the Legislature to enact the legislation. The Third Circuit determined that these allegations constituted a concession by petitioner that the officials' actions were integral to the legislative process (Pa10). Petitioner cannot now disavow his complaint's allegations.

A Governor's orchestration of the Legislature to pass a legislative measure that he supports is an activity that is "quintessentially legislative." *See Bogan, supra*, 523 U.S. at 55. The Third Circuit's determination rests on the inarguable premise that a Governor and his aides are critical participants in the process of securing enactment of legislation. The New

Jersey Constitution requires that every bill that passes the Legislature shall be presented to the Governor, who may sign or veto it. *N.J. Const.* art. V, §1, ¶14. In view of the Governor's power to veto legislation, his position on pending bills must be accommodated by the Legislature. *Cf. Buckley v. Valeo*, 424 U.S. 1, 121 (1976) ("The President is a participant in the law-making process by virtue of his authority to veto bills enacted by Congress"). *See also N.J. Const.* art. V, §1, ¶12 (governor's power to recommend measures to the Legislature). Thus, the Governor and Harrington were not mere "lobbyists." As the Third Circuit observed here, such a characterization "ignores the fundamentally different roles played by a governor and his appointees in the legislative process from those played by a private party who lobbies for legislation." (Pa19). Petitioner himself recognized this in his complaint, which claims that Governor McGreevey and Harrington directed and orchestrated the Legislature's enactment of legislation sought by the Governor.

In short, the conclusion that the defendants' activities were integral steps in the legislative process is fully in accord with well-settled law. Indeed, this result is compelled by the essential purpose of legislative immunity as expressed by this Court. Absolute legislative immunity is designed to protect the "deliberative and communicative processes" which are at the heart of the enactment of legislation. *Gravel v. United States*, *supra*, 408 U.S. at 625. As a result, legislative immunity affords protection against suits which inquire into how ... [the legislator] spoke, how he debated, how he voted, or anything he did in the chamber or in committee...." *Brewster*, *supra*, 408 U.S. at 526. This is precisely the inquiry petitioner seeks here with regard to defendants' actions in directing and orchestrating the enactment of the legislation in question.

**B. The Third Circuit Properly Followed *Bogan v. Scott-Harris*, 523 U.S. 44 (1998) In Determining That The New Jersey Legislature's Enactment Of Legislation Repealing The Poet Laureate Statute Was A Substantively Legislative Act.**

As stated by petitioner, and as recognized by the Third Circuit here, the Supreme Court has held that legislative immunity requires that the act in question be legislative both substantively and procedurally. The Third Circuit applied this two-part test in concluding that Governor McGreevey and Harrington are entitled to legislative immunity. Petitioner's claim that the Third Circuit used an incorrect test, or one that differs from that used by other circuits, is without merit. Petitioner's untenable argument is based on cases which involve markedly different facts from the situation in this case. The Third Circuit's application of the appropriate test to the facts presented here was fully consistent with this Court's ruling in *Bogan* and the decisions of the circuit courts following *Bogan.*

In *Bogan*, the Supreme Court conferred legislative immunity in a case that is factually similar to the present one. The plaintiff was the sole employee of the Department of Health and Human Services of the City of Falls River. The City adopted a budget ordinance which eliminated this department and thereby terminated plaintiff's employment. She filed a §1983 suit against the mayor and members of the city council, based on their roles with regard to enactment of the ordinance. The case was tried and the jury found defendants liable on the ground that plaintiff's constitutionally-protected speech was a substantial or motivating factor in the elimination of her position by way of the ordinance. 523 U.S. at 47-48.

The Supreme Court reversed and held that the defendants were entitled to absolute immunity. The Court stated that for

purposes of legislative immunity analysis, a court should not examine the defendants' intent, but instead must resolve "the logically prior question of whether their acts were legislative. Whether an act is legislative turns on the nature of the act, rather than on the motive or intent of the official performing it." *Id.* at 54. With regard to the mayor, the Court concluded that his actions of introducing the budget and signing the ordinance into law were legislative. *Id.* at 55. The Court emphasized that "officials outside the legislative branch are entitled to legislative immunity when they perform legislative functions," and the mayor's "actions were legislative because they were integral steps in the legislative process." *Ibid.*

The Court further determined that the defendants' actions were shielded from suit because the ordinance was substantively legislative.[4] As noted above, the Court emphasized that the focus is on the nature of the challenged action, rather than on the intent underlying it. According to the Court, the ordinance "bore all the hallmarks of traditional legislation." *Ibid.* The Court explained:

> The ordinance reflected a discretionary, policymaking decision implicating the budgetary priorities of the city and the services the city provides to its constituents. Moreover, it involved the termination of a position, which, unlike the hiring or firing of a particular employee, may have prospective implications that reach well beyond the particular occupant of the office. And the city council, in

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[4] Petitioner incorrectly states the Court in *Bogan* "reserved judgment" on the issue of whether an activity must be substantively legislative (Petition at 16). Instead, the Court addressed this issue and determined that the acts of defendants were both procedurally and substantively legislative. *Id.* at 55. The Third Circuit opinion below expressly stated that this is its understanding of *Bogan*, and therefore the Third Circuit applied the two-part "procedural and substantive" test here (Pa13, n.8).

> eliminating DHHS, certainly governed "in a field where legislators traditionally have power to act." *Tenney, supra*, at 379, 72 S.Ct., at 789. [*Ibid.*].

The Third Circuit applied precisely these standards here in determining that the New Jersey statute in question fulfills the substantively legislative test as set forth in *Bogan*. The statute of which plaintiff complains, in repealing *N.J. Stat. Ann.* §52:16A-26.9, plainly constituted "traditional legislation." In enacting it, the Legislature made the policy determination that New Jersey should not continue to have the position of poet laureate and should no longer award the William Carlos Williams citation and an honorarium every two years. The termination of the award program and the poet laureate position has "prospective implications that reach well beyond the particular occupant of the office." *See Bogan, supra*, 523 U.S. at 55. The repeal statute had numerous prospective implications that are the hallmarks of legislation: it abolished a position and an award program; it had the budgetary impact of eliminating the need to appropriate funds in the State budget for an honorarium; and it relieved the State Arts Council of the duty to convene, on a biennial basis, poet laureate selection panels of the New Jersey Council for the Humanities.

Thus, the decision here is fully consistent with the rule that the elimination of a position by legislation is a substantively legislative act because of its prospective effect beyond the holder of that office. *See also State Employees Bargaining Agent Coalition v. Rowland*, 494 F.3d 71 (2d Cir. 2007); *Gallas v. Supreme Court of Penn.*, 211 F.3d 760, 776 (3rd Cir. 2000); *Rateree v. Rockett*, 852 F.2d 946 (7th Cir. 1988). There is no disagreement among the circuits as to how to determine whether an act is substantively legislative. The Supreme Court's standards in this regard are clear, and consequently the lower courts have had no difficulty in applying them.

The cases cited by petitioner do not demonstrate a conflict between the Third Circuit decision below and other circuit court decisions. Instead, these cases involve facts which are

materially different from the facts here, and therefore legislative immunity did not apply in those matters. Unlike the present case, the cases cited involve administrative actions taken against an individual, rather than the legislative action of elimination of a position. *Acevedo-Garcia v. Vera-Monroig*, 204 F.3d 1 (1st Cir. 2000) (selective layoffs of particular employees); *Canary v. Osborn*, 211 F.3d 324 (6th Cir. 2000) (termination of specific employees); *See also Bryan v. City of Madison*, 213 F.3d 267 (5th Cir. 2000), *cert. denied*, 531 U.S. 1145 (2001) (holding that municipal decisions concerning development applications are not legislative); *Haskell v. Washington Tp.*, 864 F.2d 1266 (6th Cir. 1988) (enforcement of zoning ordinance); *Cutting v. Mazzey*, 724 F.2d 259 (1st Cir. 1984) (conditions imposed on a developer's application); *Hughes v. Tarrant County*, 948 F.2d 918 (5th Cir. 1991) (denial of an employee's request to be reimbursed for attorney fees); *Alexander v. Holden*, 66 F.3d 62 (4th Cir. 1995) ("this case does not involve the elimination of a position...."); *Kaahumanu v. County of Maui*, 315 F.3d 1215 (9th Cir. 2003) (denial of permit request to a specific applicant); *Bechard v. Rappold*, 287 F.3d 827 (9th Cir. 2002) (termination of employee seventeen months before eliminating his position).

It is apparent that the cases cited by petitioner underscore the point that the Third Circuit correctly followed *Bogan* and other case law in concluding that the New Jersey statute was a substantively legislative action.

Plaintiff also attempts to avoid legislative immunity by claiming that there is no such immunity where, as here, it is alleged that defendants' legislative actions were motivated by the intent to abridge plaintiff's First Amendment rights. However, as discussed above, legislative immunity applies without regard to considerations of defendants' intent or motive. *Bogan, supra*, 423 U.S. at 55; *Youngblood v. DeWeese*, 352 F.3d 836, 841 (3d Cir. 2003). Indeed, petitioner relies upon cases which applied this rule and granted legislative immunity in the face of a claim that the official acted with ill-intent toward the plaintiff. *See Torres Rivera v. Calderon Serra*, 412

F.3d 205, 213 (1st Cir. 2005) (Petition at 13, n.6) (granting legislative immunity to Governor for signing legislation and rejecting argument that this immunity may be abrogated if the legislation's enactment was motivated by impermissible intent); *De la Biblia Abierta v. Banks*, *supra*, 129 F.3d at 903 (petition at 13). In the other cases upon which plaintiff relies, the courts considered defendants' intent only after determining – as *Bogan* requires – that the nature of the act in question was not substantively legislative. In the present matter, in contrast, the substantively legislative nature of the statute forecloses consideration of the alleged improper intent underlying enactment of this legislation.

Petitioner's contention that immunity does not apply because the statute in question, as opposed to the individual defendants, had the purpose of removing him from the poet laureate position simply is not supported by *Bogan*. The plaintiff in *Bogan* made precisely the same claim in alleging that the city council had enacted an ordinance aimed exclusively at removing her from office due to the exercise of her First Amendment rights. A jury found that the ordinance was so motivated and the District Court denied legislative immunity on the basis that the ordinance "was an individually-targeted administrative act...." 523 U.S. at 48. The Supreme Court firmly rejected this approach and held that the only relevant consideration is whether the defendant's act is legislative. *Id.* at 54. *See also State Employees*, *supra*, 494 F.3d at 90.

Thus, the Third Circuit correctly determined that legislative immunity applied. No circuit court conflict, deviation from Supreme Court precedent, or unsettled legal issue is presented here.

## II. THE THIRD CIRCUIT'S DECISION THAT LEGISLATIVE IMMUNITY BARS PETITIONER'S CLAIM AGAINST DEFENDANTS IN THEIR OFFICIAL CAPACITIES FOR INJUNCTIVE RELIEF -- REINSTATEMENT TO THE LEGISLATIVELY REPEALED POST OF POET LAUREATE OF NEW JERSEY -- IS FULLY CONSISTENT WITH THE CASE LAW OF THIS COURT AS WELL AS ALL CIRCUIT COURTS.

In accordance with the holding of this Court in *Supreme Court of Virginia*, the Third Circuit held that legislative immunity barred petitioner's official capacity claims for injunctive relief. Contrary to petitioner's assertion, in fact there is no conflict among the circuit courts with regard to this principle of law; all circuit courts have agreed with the Third Circuit that *Supreme Court of Virginia* extends legislative immunity to prospective relief sought against officials in their official capacity.

In addition, there is another reason why Supreme Court review is unwarranted. Petitioner seeks reinstatement to a position which no longer exists by virtue of the legislation repealing the poet laureate statute. Accordingly, as the Third Circuit appropriately recognized, the relief sought would require New Jersey legislators to rescind their votes on the repeal statute and to vote in favor of re-enactment of the former statute. Such judicial intrusion into legislative affairs is plainly contrary to this Court's legislative immunity jurisprudence.

### A. The Law Is Settled That Legislative Immunity Bars Official Capacity Claims For Injunctive Relief.

In *Supreme Court of Virginia v. Consumers' Union*, 446 U.S. 719 (1980), plaintiffs challenged attorney disciplinary rules promulgated by the Supreme Court of Virginia and sued the Virginia Court and its chief justice. The chief justice was sued in both his individual and official capacity. *Id.* at 724.

This Court held that the Virginia Court and its chief justice were entitled to legislative immunity with regard to their promulgation of the rules. *Id.* at 732-34. The Court observed that pursuant to its precedents, the Speech or Debate Clause "immunizes Congressmen from suits for either prospective relief or damages," *id.* at 731, with the purpose of protecting legislators "'not only from the consequences of litigation's results but also from the burden of defending themselves.'" *Id.* at 732, quoting *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967). The Court noted that the state legislators enjoy immunity similar to that accorded to Congressmen under the Speech or Debate Clause, citing *Tenney v. Brandhove*, *supra*. *Ibid.* The Court stated that *Tenney* held that §1983 did not abrogate the common law immunity of state legislators, and although *Tenney* involved an action for damages, "its holding is equally applicable to §1983 actions seeking declaratory or injunctive relief." *Ibid.* The Court emphasized that in *Tenney*,

> We did not distinguish between actions for damages and those for prospective relief. Indeed, we have recognized elsewhere that 'a private civil action, whether for an injunction or damages, creates a distraction and forces [legislators] to divert their time, energy, and attention from their legislative tasks to defend the litigation.' [*Id.* at 733, quoting *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 503 (1975].

For these reasons, the Court held that the Virginia Court and its members were immune from suit on the basis of legislative immunity. *Id.* at 734.

Thus, *Supreme Court of Virginia* unambiguously holds that legislative immunity bars official capacity claims for injunctive relief. Every circuit court which has considered the issue has understood this to be the rule established in *Supreme Court of Virginia*. Most recently, in *State Employees Bargaining Agent Coalition v. Rowland*, 494 F.3d 71 (2d Cir. 2007), the Second Circuit, in considering the legislative immunity of Connecticut officials (including the Governor) for abolition of state

employee positions in the budget process, held that *Supreme Court of Virginia* established the rule that legislative immunity bars claims for injunctive relief against state officials in their official capacities. *Id.* at 83-84. The Court characterized that Supreme Court opinion as "squarely-applicable precedent." *Id.* at 86-87. It also noted that in *Supreme Court of Virginia*, the Supreme Court cited approvingly the Second Circuit's decision in *Star Distribution, Ltd. v. Marino*, 613 F.2d 4 (2d Cir. 1980), which held that legislative immunity bars an action for declaratory and injunctive relief. *Id.* at 84, citing *Supreme Court of Virginia*, 446 U.S. at 732 n.10.

The Eleventh Circuit has similarly held that *Supreme Court of Virginia* requires the conclusion that legislative immunity covers official capacity prospective relief claims. *Scott v. Taylor*, 405 F.3d 1251, 1253-56 (11th Cir. 2005). The Third Circuit, of course, reached the same conclusion in the present case. In addition, it has previously determined that "in fact the Supreme Court in *Consumers Union* did resolve the issue of the application of absolute legislative immunity to claims for prospective relief and answered that question in the affirmative." *Larsen, supra,* 152 F.3d at 252. The First, Sixth, and Seventh Circuits have reached the same result. *Risser v. Thompson*, 930 F.2d 549, 551 (7th Cir. 1991); *Alia v. Michigan Supreme Court*, 906 F.2d 1100, 1101 (6th Cir. 1990) (legislative immunity "applies whether the relief sought is money damages or injunctive relief"); *Colon Berrios v. Hernandez Agosto*, 716 F.2d 85, 91 (1st Cir. 1985).

In contrast, petitioner is unable to cite a single reported case in which a circuit court has construed *Supreme Court of Virginia* differently and has held that legislative immunity does not bar official capacity injunctive relief claims. Petitioner instead points to cases which indicate that other immunities, such as prosecutorial and qualified, do not apply to official capacity suits. *See Turner v. Houma Mun. Fire and Police Civ. Serv.*, 229 F.3d 478, 483 (5th Cir. 2000); *Burge v. Parish of St. Tammany*, 187 F.3d 452, 466 (5th Cir. 1999); *Supreme Video,*

*Inc. v. Schauz*, 15 F.3d 1435, 1442 (7th Cir. 1994).[5] These cases have no relevance to the settled law which pertains specifically to the protection from suit, not just damages, afforded by legislative immunity.

Accordingly, there is no circuit court conflict, or indeed any uncertainty in this area of the law. The circuit courts have consistently followed the unequivocal holding of *Supreme Court of Virginia* that legislative immunity cuts off official capacity injunctive relief claims which are based on legislative conduct.

Petitioner's reliance on dicta in *Kentucky v. Graham*, 473 U.S. 159 (1985) is unavailing. Petitioner places undue weight on a comment in that opinion to the effect that personal immunity defenses are unavailable in an official capacity action. *Id.* at 167. As the Second Circuit has noted, this general dicta plainly does not overrule the "squarely-applicable precedent" of *Supreme Court of Virginia* on the specific question of legislative immunity in an official capacity action. *State Employees, supra.* Indeed, petitioner's interpretation of *Kentucky v. Graham* is contradicted in the Court's opinion, where the Court observed that in *Supreme Court of Virginia* it considered a suit against the Virginia Court and chief justice "in his official capacity" and "we held that absolute immunity shielded these defendants for acts taken in their legislative capacity." *Id.* at 164. *See also Spallone v. United States*, 493 U.S. 265, 278 (1990) ("We applied this same doctrine of legislative immunity ... to actions for both damages and injunctive relief in *Supreme Court of Virginia*").

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[5] *Minton v. St. Bernard Parish School Bd.*, 803 F.2d 129, 135 (5th Cir. 1986) does not address the holding of *Supreme Court of Virginia* in this regard presumably because the *Minton* court did not resolve the issue of whether the defendants engaged in legislative or administrative actions.

As noted, no circuit court has understood the rule to be other than what the Third Circuit held here — that legislative immunity bars official capacity injunctive relief claims. Since the purpose of legislative immunity, according to the Supreme Court, is to free legislators from the distractions of suits concerning their legislative actions, *Supreme Court of Virginia*, *supra*, 446 U.S. at 733, there is no basis for the argument that official capacity suits for injunctive relief against legislators may proceed.

**B. The Prospective Relief Sought By Petitioner is Barred by Legislative Immunity Because it Would Require Legislators To Rescind Their Votes On The Challenged Legislation And Cast Votes Enacting New Legislation.**

The Third Circuit concluded that there is an additional reason to apply legislative immunity to the injunctive relief claim: the remedy sought by petitioner would infringe on the role of the New Jersey Legislature. Petitioner seeks reinstatement as poet laureate of New Jersey. However, there is no such position in existence as a result of the enactment of the statute which repealed the prior legislative creation of the position. As a result, the relief sought by petitioner necessarily requires that the court undo the Legislature's repeal statute and order the Legislature to re-enact the repealed law. It cannot be reasonably disputed that this result would, as the Third Circuit said, "seriously interfere with the role assigned exclusively to the Legislature." (Pa21).

The Third Circuit's earlier decision in *Larsen*, upon which it relied here, presented a similarly improper request for injunctive relief against legislators. Larsen, a state Supreme Court justice, challenged the state Senate's impeachment of him and sought reinstatement to his judicial post. Since such reinstatement would require that individual senators rescind their impeachment votes, the court declined to interfere with the legislators in such fashion. 152 F.3d at 254.

In *State Employees*, *supra*, the Second Circuit explained further the rationale underlying the foregoing principle. The court indicated its agreement with the Third Circuit that, "in considering whether the doctrine of legislative immunity is available to foreclose claims for injunctive relief in official-capacity suits, we must also look more specifically to whether granting the particular relief sought would enjoin defendants in their legislative capacities." *Id.* at 88 (emphasis in original). The Second Circuit observed that this analysis is required by *Supreme Court of Virginia*. In that case, the Supreme Court held that legislative immunity barred injunctive relief seeking to compel performance of legislative actions such as repeal or amendment of the bar code that had been promulgated. However, as the Second Circuit recognized in *State Employees*, the Supreme Court stated in *Supreme Court of Virginia* that injunctive relief claims could be brought with regard to future actions that involve the administrative function of enforcing the code's provisions. *See* 446 U.S. at 736. Enforcement is not a legislative act and therefore is not subject to legislative immunity.

The Second Circuit properly applied this distinction and held that legislative immunity did not prohibit reinstatement of plaintiffs to other existing state positions, rather than their abolished positions. According to the court, placement of the plaintiffs in other existing positions would compel administrative action only. *Id.* at 93. In contrast, legislative immunity bars reinstatement to the previously-held positions "because ordering such relief would require no less than a judicial order compelling defendants, in their official capacities, to re-create positions that would have been eliminated through prior legislative actions." *Id.* at 94. In other words, this "would compel the rescission of an existing budget agreement and the enactment of new budget legislation — precisely the activity which the legislative immunity privilege seeks to protect." *Ibid.*

Similarly, in this case, petitioner seeks a judicial order that would compel rescission of legislators' votes enacting legislation – P.L. 2003, c. 123, the repealer statute – and the

enactment of new legislation providing for re-creation of the legislatively-eliminated poet laureate position. Without such votes by individual legislators, there is no poet laureate position in existence and therefore no reinstatement remedy.

Petitioner cites no cases which suggest that a court may order legislators to enact legislation. He simply states that he seeks a court order compelling state officials to reinstate him to the poet laureate position. The obvious flaw in this argument is that, pursuant to statute, there is no poet laureate position in which petitioner could be placed.

*Spallone v. United States*, 493 U.S. 265 (1990), mentioned in the petition with regard to remedy, is not applicable as it deals with the different situation of a consent decree covering a city council. More important, *Spallone* actually confirms that legislative immunity precludes the courts from fashioning injunctive relief which intrudes upon the legislative process. The Court held that in view of principles of legislative immunity, the district court erred in holding the council members in contempt for refusing to vote in favor of legislation implementing the consent decree. *Id.* at 278-80.

Thus, petitioner has not raised a question worthy of *certiorari*. The Supreme Court has issued clear precedent stating that legislative immunity bars official capacity injunctive relief, and the circuit courts, including the Third Circuit, have rendered consistent rulings upholding this principle.

## CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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